

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

DAVID E. BANKS,

Petitioner,

: Case No. 3:14-cv-393

- vs -

District Judge Thomas M. Rose
Magistrate Judge Michael R. Merz

WARDEN, Chillicothe Correctional
Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This is a habeas corpus case brought *pro se* by Petitioner David E. Banks to obtain relief from his conviction in the Montgomery County Common Pleas Court on charges of burglary, obstructing official business, and possession of criminal tools (Petition, Doc. No. 2, PageID 1¹.)

The case is before the Court for initial review pursuant to Rule 4 of the Rules Governing § 2254 Cases which provides in pertinent part: “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.”

Banks claims he was advised by his attorney that if he pled guilty, he would only be

¹ When any document is filed with this Court, the Court’s electronic filing system affixes a unique Page Identification Number in the upper right hand corner of every page. The attention of the parties is directed to this Magistrate Judge’s Standing Order of May 8, 2014, which provides in pertinent part “All references to the record in this Court must be to the filed document by title, docket number, and PageID reference. (E.g., Defendant’s Motion to Dismiss, Doc. No. 27, PageID ____.) The large majority of cases before this Magistrate Judge are habeas corpus cases with large state court records and correct citation to the record is critical to judicial economy. Therefore, nonconforming filings will be stricken.

sentenced to four years imprisonment, but in fact was sentenced to eight (Ground One for Relief, PageID 84.) His Second Ground for Relief claims his judgment entry of conviction is not valid because it is not signed. *Id.* at PageID 85. Finally, he claims the Supreme Court of Ohio abused its discretion when it refused to accept his Memorandum in Support of Jurisdiction when it was only one day late. *Id.* at PageID 87.

Banks raised his first two grounds for relief for the first time in his petition for post-conviction relief under Ohio Revised Code § 2953.21. He timely appealed from denial of that petition and received a decision on the merits from the Second District Court of Appeals. However, he missed the deadline for appealing to the Supreme Court of Ohio. While Banks now claims it was an abuse of discretion for the Ohio Supreme Court to refuse his filing, the Sixth Circuit had held that the 45-day time limit on appeal to Ohio Supreme Court is an adequate and independent state ground of decision. *Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004)(citations omitted).

The procedural default doctrine in habeas corpus is described by the Supreme Court as follows:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional right he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107, 110 (1982).

Because Banks did not timely file his appeal with the Supreme Court of Ohio, he has procedurally defaulted on his claims. It is therefore respectfully recommended that the Petition be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

November 20, 2014.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).